

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ROBERT T. WIRT and)	
LORRAINE S. WIRT,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1999-12-271
)	
WILLIAM A. MATTHEWS,)	
Individually, WILLIAM A.)	
MATTHEWS ASSOCIATES, INC.,)	
a Delaware corporation, and)	
ROBERT L. MATTHEWS, JR.,)	
)	
Defendants.))	

Date Submitted: January 11, 2002
Date Decided: February 7, 2002

Edward F. Kafader, Esquire
Ferry & Joseph, P.A.
Suite 904
824 Market Street Mall
Wilmington, DE 19801
Attorney for Plaintiffs

Richard E. Franta, Esquire
Suite 102
1301 North Harrison Street
Wilmington, DE 19806
Attorney for Defendant
Robert L. Matthews, Jr.

Paul A. Bradley, Esquire
McCarter & English, LLP
Suite 950
919 North Market Street
Wilmington, DE 19801
Attorney for Defendants
William A. Matthews and
William A. Matthews Associates

FINAL DECISION AND ORDER

Trial in the above-captioned matter took place on January 11, 2002. Following the receipt of evidence and testimony, the Court reserved decision. This is the Court's Final Decision and Order.

The instant action is brought for compensatory and punitive damages against defendants who are previous officers of William A. Matthews Associates, Inc. and have also been sued individually. The action against the corporation, William A. Matthews Associates, Inc., is for breach of contract, failure to perform in a commercially or reasonable and/or workmanlike manner, failing to perform in accordance with the contract terms and specifications as well as the New Castle County Building Code. Against William A. Matthews individually and Robert L. Matthews, Jr., plaintiff seeks damages for both common law and commercial fraud. Against Robert L. Matthews, Jr., plaintiff seeks damages for commercial and common law fraud for material misrepresentations and for allegedly concealing unsafe and unworkmanlike construction and for intentionally misrepresenting their qualifications and expertise. At trial the corporate entity, William A. Matthews Associates, Inc. admitted liability but contested only the amount of damages. Besides these claims, plaintiff also seeks punitive damages.

Defendants have denied liability and have asserted affirmative defenses including, but not limited to, plaintiff's changing the grade on the subject property by elevating the dirt addition to the building, and approval by New Castle County Building Inspectors who issued a Certificate of Occupancy. Both Robert and William have denied any commercial or common law fraud claims.

For the reasons set forth below, the Court enters joint and several judgment in the amount of Twenty-One Thousand Nine Hundred Seventy-Five Dollars (\$21,975.00) against William A. Matthews Associates, Inc. and William A. Matthews. The Court finds that plaintiff failed to prove by a preponderance of evidence any common law or commercial fraud against Robert L. Matthews, Jr. The Court does find by a preponderance of evidence a claim for both common law and/or commercial fraud against William A. Matthews, individually, and enters judgment in the amount of Ten Thousand Dollars (\$10,000.00). As to the punitive damages, against William A. Matthews, the Court enters a judgment of Five Thousand Dollars (\$5,000.00). The total judgment against all defendants therefore is Thirty-Six Thousand Nine Hundred Seventy-Five Dollars (\$36,975.00) plus pre- and post-judgment interests and costs.

THE FACTS

The facts at trial indicated the following. Robert L. Matthews, Jr., an officer of William A. Matthews Associates, Inc. was employed four (4) years at the time of the construction of the property in question located at 1505 Spring Lane, Bellevue Manor, Wilmington, Delaware, where defendants installed an addition to plaintiff's house ("the addition"). Besides Robert and William Matthews, there were two (2) other employees employed by William A. Matthews Associates, Inc. William A. Matthews ("William") was contacted by the Wirts while they

were building an addition to a house down the street. William personally prepared the proposal to the addition to the Wirts who executed the same.¹ The proposal represented that defendants would make application through Licenses and Inspections of New Castle County. It was Robert's job to file the application and seek approval from New Castle County.

At trial, evidence was presented through plaintiff's Exhibit "3" at page 4 that depicted a cross-section of the plans to the addition to plaintiff's property. The Court heard an abundance of testimony on this exhibit. The "cross-section view" on plaintiff's #2 indicated there was a 12 inch wide by 32 inch deep "footer"; followed by six (6) courses of 8 x 8 x 16 block; followed by ½ inch foam insulation; followed by a 2 x 8 inch seal plate and there was also anchor bolts installed. Of ultimate significance in this trial is that during the approval process, New Castle County required an 18 inch space from grade between the ground. At trial, it was clear that the 2 x 12 floor joists were installed to hold up the subject property.

There also was depicted on plaintiff's #3 that the defendants wrote on the "floor plan" page, an "18 x 30" inch "existing basement window with crawl space", access and ventilation. At trial it was proven that the window never existed at the property site prior to the addition or

¹ See, plaintiff's Exhibit "3."

at the time approval was sought by defendants from New Castle County to start the application process.

William was in the “learning process” at the time he submitted these plans. Once the plans were approved by New Castle County “work began fairly promptly” on building the addition.

William did the concrete block work installation which is depicted in State’s Exhibit’s “3.”

Plaintiff’s Exhibit “5” was a picture depicting the site after the floor joists, 2 x 12 were layed and hooked into the foundation. Robert did not discuss with Bill the 18 inch space required on the County plans, nor did Robert discuss with Mr. Wirt the 18 inch space gap that New Castle County had drawn on the plans or access to the window that was set forth as existing on the plans.

The floor joists that were installed were 2 x 12 and were pine, untreated wood.

On cross-examination, Robert indicated that the 18 inch notation was not on the plans when he submitted the same to New Castle County. New Castle County requested this amendment on the plans in order for approval. At trial it was also clear that Robert was unaware of any specification or rule that required the 18 inch space, but that the New Castle County Plan Examiner that approved the plans had, in fact, required the 18 inch crawl space.

Robert could not provide a reason at trial why the existing basement window with crawl space marked 18 inches by 30 inches was on the plans even though it did not exist. Robert had only submitted a handful of plans to New Castle County when he submitted this application to New Castle County.

Plaintiff's Exhibits 2 - "A" through "F" were a series of pictures Robert took of the addition. Robert took "many pictures of the job site" because he was "proud of it" and these pictures show the block and footers as well and different phases of completion. Robert testified at trial that no backhoe was used and all the footers were "hand dug".

At trial there was testimony from Robert as well as several witnesses that there was a footer inspection was performed by New Castle County.

Robert testified at trial that "it should have been obvious the 2 x 12 joists were at ground level when the County inspectors inspected the property".

Robert also testified at trial that the window depicted on the plans submitted by New Castle County was non-existent when the County approved the same. Robert also testified that if the plans approved by New Castle County had been followed the existing doorway on the addition could not be used, because 18 inches was "too high of a space".

Robert at trial testified that his brother William determined the 8 inch crawl space was to be installed instead of the 18 inch space required by the approved plans. A New Castle County Inspector never inspected the 8 inch height of the existing crawl space they actually installed.²

Robert testified that he “never concealed anything” from “New Castle County Inspectors, “took pictures of the job and various times” and “simply wanted to create a record of the good job he was doing”.

Robert testified at trial that he “now understands” the need for cross ventilation and space between the ground and floor joists.

Robert T. Wirt testified at trial. He owns the subject property and was “very happy” with the addition when it was originally built by defendants. He does not recall seeing any of the drawings or specifications. The contract marked as plaintiff’s Exhibit “2” was shown to him at trial. The contract provided that “all material to be guaranteed as specified” for \$21,255. Page 3 of plaintiff’s Exhibit “2” specifically provided set forth as follows:

All materials guaranteed to be specified, and the above work to be performed in accordance with the drawings and specifications submitted for the above work and completed in substantial

² New procedures apparently have now been implemented by New Castle County in the past three years which require 32 to 36 inches between ground and the 22 inch floor joists. New Castle County now also requires a vent on both sides of 12 X 24 inches in order for cross-ventilation.

workmanlike manner for the sum of:
\$21,255.00.

A payment schedule was also set forth in Exhibit 2.

Wirt “never had any discussions” about the 18 inch crawl space or ventilation requirements which was required by the contract plans with either Robert or William. Construction started in November, 1992 and was completed in 1993. In mid-November Wirt discovered a problem by accident while sitting in his chair Wirt noticed an area around the baseboard where there was a 3-inch gap from the wall board. Wirt noticed the space and contacted William. William came to the site and informed Wirt he believed that it was a window leak problem because of caulking.

Wirt then contacted Chris Iacono (“Iacono”) who cut a 2 x 2 inch hole in the addition. Iacono found what he believed to be water damage and some crumbling sheet rock and plywood when he examined the 2 X 2 inch hole.

Plaintiff’s Exhibit “1” was moved into evidence. This exhibit is The Steinle Construction Engineers’ Report (“The Steinle Report”) which concluded the addition was not constructed according to approved New Castle County building permit plans from New Castle County. The Steinle Report also included the interior settlement beneath the windows was the “result of rotten structure framing members below.” The report at page 2 also included the structural framing members “have rotted because the under floor crawl space was not vented and the floor joist

did not have the required 18 inch minimum clearance to the crawl space grade.” Finally, the Steinle Report concluded the stucco covered plywood is rotted because exterior walls were placed directly against the plywood.

The Steinle Report also made certain structural recommendations which were clearly set forth on page 3 of plaintiff’s Exhibit “1.”

The structural recommendations included, inter alia, to temporarily shore the existing roof; remove all exterior plywood, sheeting and windows; remove the interior terra cotta floors, timber, framing, and drywall. The masonry foundation could remain. The Steinle Report recommended that there be placed compacted structural fill with existing masonry foundation of four (4) inches of concrete to finish grade and reconstruct the timber wall framing and reset the windows. Other recommendations were to reinstall what was removed, back fill the structure and install new terra cotta floors.

As a result of the inspection by Iacono Iacono prepared a contract proposal to do the repair work. Plaintiff’s Exhibit “6.” This proposal would follow the recommendations of the Steinle Report except Iacono concluded the roof to the existing addition could not be saved. Iacono therefore concluded his plan required \$30,860 to totally replace the addition.

At trial Wirt indicated an additional \$16,000 was paid by the Wirts to make a larger existing room other than the original planned 16 x 17 room built by defendants.

At trial Frank J. Roberto (“Roberto”) testified. Roberto is employed by New Castle County as an Assistant Land Use Administrator assigned to Licenses and Inspections. Roberto brought the Wirt file to trial and Roberto testified concerning the Wirt application process by defendants. Roberto basically affirmed all the testimony previously set forth in the trial record. Roberto confirmed that there was an 18-inch crawl space required in the plan approval process for the Wirt residence, as well as a requirement for an existing crawl space window 18 x 30 inches for ventilation. Roberto also confirmed that if the contractor does not use sap or treated wood, the wood “would rot”. Roberto testified that a footing inspection did, in fact, occur and that the existence of an 18 x 30 inch window would have been obvious to the County inspector who actually inspected the addition.

Roberto also reviewed defendant’s Exhibit “1-A” through “F” which is a series of pictures. Roberto believed the absence of the window was not concealed by the contractor. However, Roberto believed the 18 inch inspection did not review the 2 x 18 inch untreated wood joists which only provided an 8 inch instead of 18 inch crawl space joists.

Roberto testified that The New Castle County Building Code has now been amended with more stringent standards which require a vapor sealer on the ground, cross-ventilation.

Chris Iacono (“Iacono”) testified. He has been self-employed for the past five and half (5 ½) years as owner of Iacono Construction, Inc. He has a “long history” in the construction business previously working for his father. Iacono reviewed the Steinle Report and actually did the construction work installing the new addition at the Wirt residence. Plaintiff’s Exhibit “7” according to Iacono shows the floor joist conditions.

Iacono agrees that New Castle County Code requires an 18 inch crawl space for ventilation and that had the addition, in fact, been built according to the approved plans, he believes the property “would not have rotted the way it did”. Iacono testified that the joists at the site of the addition are actually “below grade” and that the lack of ventilation, in part, caused all the rotting. Iacono’s testimony was that the construction work of defendants was below the standard of a workmanlike manner. Iacono based this opinion on the fact that the untreated floor joists below grade rotted and caused the problem which required the new replacement addition to be built.³ The cost according to Iacono for the replacement addition was \$30,865 for his proposal. The additional

³ Originally Iacono discussed with Wirt keeping the windows and doors from the defendants, addition but the roof had to be replaced because of leaks and cracks contrary to the Steinle Report. Iacono, therefore, replaced the existing roof on the addition.

\$16,000 was to expand the building as the Wirts had requested outside the previous 16' X 17' addition built by defendants.

Defendant's Exhibit "4" indicated the actual cost of \$27,975. Iacono did the necessary work and built the new addition.

Plaintiff's Exhibit "10" was a picture that shows the block foundation and shows it below grade of the yard. Plaintiff's Exhibit "11" was the stucco pulled off the exterior wall which showed the plywood had rotted out.

William A. Matthews ("Matthews") testified at trial. He is President of the corporation and was majority shareholder in 1993. William has 15 years of experience on the job. William did not do the actual drawings submitted to New Castle County because his brother Robert wrote the same. However, William was President of the company and "overall had responsibility" at the time the addition was built at the Wirt residence.

William was aware of the 18-inch requirement of the crawl space and "can't answer" why he did not dig out the full 18 inches for the crawl space. If William had dug out the full 18 inch crawl space, it would be 270 square feet and cost his company very little to do the same. William testified, however, he was "fully aware of the requirement" to dig out 18 inches as required by the plans approved by New Castle County. William also installed the 2 x 8 inch blocks as depicted in plaintiff's Exhibit "1" and "somehow" the ventilation and the 18-inch space "got

forgotten on the job.” William testified that “mistakes happen” and that although he signed the contract with Wirt and represented he would build the addition to the Wirt residence according to the plans and specifications approved by the New Castle County Code, he failed to do the same. William believed it was, in fact, responsible for Wirt to rely on his representations that the addition would be built to Code. William, however, never informed Wirt about the 18-inch requirement for the crawl space.

William testified at trial there should have been two (2) blocks, one on each side, for cross ventilation for the addition when he completed the job, but failed to install both of those blocks so that cross-ventilation could occur. William testified based upon his own analysis using a trade book for repairs that he could have repaired the existing addition for only \$11,000.

DISCUSSION

At trial in opening statements Mr. Bradley conceded on behalf of his client liability on behalf of the corporation William A. Matthews Associates, Inc. The corporation disputes the amount of damages. Based upon the testimony at trial it is clear that with regards to the breach of contract allegations that that judgment should be entered against the corporation with pre- and post-judgment costs because this breach of contract claim was proven by a preponderance of

evidence. Judgment is therefore entered as set forth below on the breach of contract claim against William A. Matthews, Inc.⁴

What is left for the Court to decide is whether the Count II fraud claims against the corporate and individual defendants were proven by a preponderance of evidence.

According to Count II, defendants materially represented to plaintiffs in New Castle County that all construction work would be completed in a commercially reasonable and workmanlike manner in compliance with the contract terms and local Building Codes; intentionally concealed unsafe and unworkmanlike construction of the remodeling work; and intentionally misrepresented its qualifications and expertise to plaintiffs in order to induce plaintiff's to enter into said contract. Finally, plaintiffs allege in paragraph 14 of the complaint that the defendant's conduct was willful and wanton in violation of common law and consumer fraud, 6 Del. C. § 2511, et seq.

OPINION AND ORDER

With regard to Count I of plaintiff's complaint, William A. Matthews Associates, Inc. have conceded liability on the breach of contract claim but dispute the amount of damages. The complaint does not plead a specific amount in its prayer for relief, but clearly plaintiffs have proven

⁴ It was stipulated at the end of trial that plaintiff's previous counsel withdrew Count III of the negligence claims. The Court does need not readdress the issue of whether the negligence counts were proven by a preponderance of the evidence.

damages at trial in the amount of \$21,975.00 on the contract. See: J.J. White, Inc. v. Metropolitan Merchandise Mart. Del.Super., 107 A2d 892, 894 (1954); 5 Corbin, Contracts §992; McCormick, Damages §561, II Williston, Contracts §1338; “Where a breach of contract occurs between two parties, the law of damages seeks to place the aggrieved party in the same economic position [he] would have been if the contract had been performed by the breaching party.” “The award of damages is meant to compensate the injured party with the losses caused and gains prevented by the defendants breach.” Restatement 2d, of contracts §347.

In Delaware, “the traditional measure of damages is that which is utilized in connection with an award of compensatory damages, whose purpose is to compensate a plaintiff for it’s proven, actual loss caused by the defendants wrongful conduct. To achieve that purpose, compensatory damages are measured by the plaintiffs ‘out-of-pocket’ actual loss, Strausberger v. Early, Del.ch., 752 A2d. 557(2000). See, also American General Corp. v. Continental Airlines Corp., Del.Ch. 622 A2d, (1992); aff.’d 620 A2d. 856. (damages to plaintiff may be further measured by what is necessary had full performance been rendered)

Clearly, William A. Matthews, Inc., materially breached the contract and the trial record supports compensatory damages by a preponderance of the evidence jointly and severally against William and William A. Matthews, Inc., in the amount of \$21,975.00. The court discounts defendant William Matthews testimony that the repairs could

be fixed pursuant to application of a trade journals' procedure to mitigate damages. When William was called initially back to the property by plaintiffs to inspect the property he took no responsibility and blamed the leaks on caulking in a window sill. These damages of \$21,975.00 were clearly a direct and proximate result of defendant's breach of the contract by not properly venting the under floor crawl space; not having the required approval New Castle County plan filed by defendants of a minimum of 18 inch clearance; and using untreated pine 2" x 18" beams to structurally hold up the property.

Plaintiff's expert at trial so testified and the court concluded that all defendants failed to build the subject addition in a commercially reasonable and/or workmanlike manner but not in accordance with the contract terms as well as the approved plans and specifications filed with New Castle County. No window was over constructed as represented in the approved plans. Nor was the 18 inch floor build according to the same plans.

With regard to Count II of the complaint, fraud, the complaint alleges in paragraphs (a-c) material misrepresentation by all defendants as to compliance with the contract terms, local building codes, and misrepresentation that "all construction would be completed in a commercially reasonable and workmanlike manner".

Paragraph 12(b) alleges all defendants "intentionally concealed unsafe and unworkmanlike construction... which it contracted to

complete in compliance with the contract terms and New Castle County Building Code”. Paragraph 12(c) “alleges misrepresentation as to all defendants’ qualifications and expertise in order to induce plaintiffs to enter into a contract...”

As set forth in Stephenson v. Capano Development, Inc., Del. Super., 462 A2d 1069, 1074 (1983) the elements of fraud which must be proven by a preponderance of the evidence are as follows:

- (I) a false representation, usually on of fact, made by the defendant;
- (II) the defendant’s knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
- (III) an intent to induce the plaintiff to act or to refrain from acting;
- (IV) the plaintiffs action or inaction taken in justifiable reliance **damage** to the plaintiff as a result of such reliance.

“Fraud may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak.” Schmeusser v. Schmeusser, Del. Super. 559 A2d 1294, 1297 (1989).

As set forth in Stephenson v. Capano, Del. Super 462 A2d 1069 (1983) ... “Fraud does not consists merely of overt misrepresentations. It may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak. Thus, one is equally culpable of fraud who by omission fails to reveal that which is his duty to disclose in order to prevent statements actually made from being misleading. Lock v. Schreppler, Del. Super. 426 A2d. 856 (1981); Leech v. Hushands, Del. Super., 34 Del. 362, 152 A2d 729 (1930). In Robert E. Walstenholme et

al v. Hygenic Exterminating Co. Inc., 1988 Del. Super. Lexis 285 (1988)

the court explained the requirements of Fraudulent Misrepresentation as follows:

* * *

“fraudulent **misrepresentation** requires the plaintiffs to demonstrate that:
defendant made a substantial, material **misrepresentation** respecting the transaction;
The representation must be false;
The defendant must have known the representation was false when he made it;
The defendant made the representation with the intention of inducing the plaintiffs to act upon it; and
The plaintiffs did act in reliance on the statement and were harmed as a result.

Nye Odorless Incinerator Corp. v. Felton, Del. Super., [*8] 5 WW 236, 162 A. 504 (1931); In Re Brandywine Volkswagon, Ltd., Del. Super., 306 Lock v. Schreppler, 246 A.2d at 861.

“Plaintiffs must demonstrate that defendant took some action affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the **fraud** claim, some artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry. Nardo v. Guido DeAscanis, Del. Super., 254 A.2d 254 (1969).” Lick v. Schreppler, *supra*.

In fraudulent **misrepresentation**, the statement relied upon must be false. In a fraudulent concealment case in which the “affirmative act” is a statement, it may or may not be false, but must be :designed or intended to prevent:, and in fact prevent, the discovery of facts giving rise to the **fraud** claim.

As set forth in Lankford Signs, Inc. v. James Teneffoss and Jim Lee, Inc. 1998 Del. C.P. Lexis 4 (1988) the law regarding the award of damages for misrepresentation is as follows:

....The measure of **damages** for fraudulent **misrepresentation** is, generally limited to those which are the direct and proximate result of the false representation or actual 'out-of-pocket' loss. "n15 Punitive **damages** may be obtained where the **fraud** is "gross, oppressive or aggravated, or where it involved breach of trust or confidence." n16 Tennefoss' **misrepresentations** fall within this standard. The amount of punitive **damages** "should be reasonably proportionate to the actual **damages**, but no particular ratio can be fixed in the abstract." n17 although the contract remedy is premised on a loss of bargain basis (i.e., had the contract been performed), and tort **damages** are calculated to restore the status quo (i.e., had the **fraud** not occurred), the compensatory award is the same under the facts in this case.

Apply this case law to the trial record, the court finds by a preponderance of the evidence both intentional misrepresentation and fraud against William individually as well as punitive damages. William by a preponderance of the evidence committed the allegations contained in paragraphs 12(a) - (c) of the complaint. Looking closely at the elements listed above for fraud, William by a preponderance of the evidence materially misrepresented all the work to be performed in a commercially reasonable manner; in compliance with the "drawings and specifications"; the fact an 18 inch crawl space would be built; and a vent window would be installed as set on the approved plans. This work was not done in accordance with the New Castle County Code. William knew these representations to be false; materially concealed the 18 inch crawl space, all of which would cause the building addition to collapse and be built in an unworkmanlike manner. The non-treated 2 X 12 inch joists were also not disclosed to plaintiffs and were the proximate cause

with the 8 inch crawl space and lack of ventilation to the unworkmanlike addition. The Court enters judgment on the fraud counts in the amount of \$10,000.00 against William and William A. Matthews, Inc., jointly and severally. As to punitive damages the judgment is joint and several against both defendants in the amount of \$5,000.00.

As to Robert the Court finds the fraud and misrepresentation allegations in the complaint were not proven by a preponderance of the evidence. Looking at the totality of the circumstances in the trial record, including the fact that Robert took pictures of the work, did not misrepresent or conceal his qualifications, and based upon his youthful inexperience lacked the intent to commit fraud. The Court finds William to be primarily responsible for the fraud committed against the Wirts, not Robert, and enters judgment in the fraud counts in favor of Robert.

IT IS SO ORDERED this _____ day of February, 2002.

John K. Welch
Associate Judge

